UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs, All | Idaho Supreme Court Records & Briefs

8-25-2017

In Re SRBA Case No. 39576 Subase No. 37-00864 Appellant's Reply Brief Dckt. 44716

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"In Re SRBA Case No. 39576 Subase No. 37-00864 Appellant's Reply Brief Dckt. 44716" (2017). *Idaho Supreme Court Records & Briefs, All*. 7090.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/7090

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE SRBA, CASE NO. 39576 SUBCASE NO.: 37-00864	)	Supreme Court Case No: 44716-2016
GARY AND GLENNA EDEN, Appellants, v. STATE OF IDAHO, Respondent.	)	

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County
Honorable Eric J. Wildman, Snake River Basin Adjudication, Presiding

Merlyn W. Clark, ISB #1026
Dana L. Hofstetter, ISB #3867
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617

Attorneys for Appellants Gary and Glenna Eden

Attorney General Lawrence G. Wasden
Deputy Attorney General Darrell G. Early
Deputy Attorney General Shantel M. Chapple Knowlton
State of Idaho
Natural Resources Division
Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010

Attorneys for State of Idaho

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. REBUTTAL ARGUMENT

A. Introduction.

In *Respondent's Brief*, the State's essential position is that the Edens were to blame for the disallowal in default of their Water Right No. 37-864. The State takes this "blame the victim" approach notwithstanding that, based on uncontroverted facts, the Idaho Department of Water Resources ("IDWR") committed no less than four material statutory/due process errors in their handling of the Edens' claim for Water Right No. 37-864:

> **1. IDWR used an incorrect mailing address to provide the Edens claim information, although IDWR had just received the Edens' written confirmation of their correct mailing address.**
>
> **2. In violation of Idaho Code § 42-1408(5), IDWR filed a fatally defective affidavit for proof of service of the *Second Round Service Notice*.**
>
> **3. In violation of I.R.C.P. 55(b)(2), IDWR failed to serve the Edens personally with a Three-Day Notice of Intent to Take Default, prior to seeking the disallowance of Water Right No. 37-864 in default against them.**
>
> **4. Also in violation of I.R.C.P. 55(b)(2), IDWR failed to provide the Court Clerk written certification of the name of Edens and the address most likely to give the Edens notice of default judgment with respect to Water Right No. 37-864.**

Instead of acknowledging IDWR's errors, the State convinced the District Court to disregard them and shift the blame to the Edens. Now the State also asks this Court to do the same, to impose upon the Edens a permanent loss of their Water Right No. 37-864 resulting from these IDWR oversights in the interest of "finality." Instead of acknowledging the IDWR errors and the causative role of these oversights in the disallowance in default of 37-864, the State

argues that the Edens "should have known" that their claim submitted to IDWR was not satisfactory and that the Edens were unreasonable to believe they had done all they needed to do to make a claim for 37-864.[1] However, the law does not place the burden of divine inspiration, or, even, innate knowledge, on water right claimants, as the State asserts: The Constitutions of this Country and this State, along with State statutes and Court Rules, require that accurate, complete and unambiguous notice is personally served prior to and after one of the most

---

1 The State makes this "should have known" argument even though, as the State also acknowledges, there is no evidence in the record to support the District Court's finding that the Edens had previous experience submitting an SRBA Claim for another water right.

At first, the State misleadingly suggests that the Edens had experience filing claims, asserting: "Water right no. 37-864 was not the Edens only water interest in the Snake River Basin. The Edens own at least one other water right that was properly claimed in the SRBA, water right no. 37-10953. RR Vol. I, pp. 316-17. The Edens received a partial decree for water right no. 37-10953 in 2002. R Vol. I, p. 709." *Respondent's Brief* at 9. Contrarily, the State also admits, however, that the SRBA Claims for the other water rights held by the Edens, including 37-10953, were submitted by the Edens' predecessors: "This letter referred to 'Snake River Basin Adjudication (SRBA) Notices of Claim to a Water Right #37-365, 37-366 and 37-367B and Decrees #37-10322 and 10953.' R Vol. I, p. 214. IDWR's records indicate that notice of claims were filed for the above water rights in the SRBA by the Edens' predecessors in interest and ownership of those claims was transferred to the Edens. R Vol. I, pp. 308-319." *Respondent's Brief* at 9, n. 10 (emphasis added).

The District Court apparently was misled on the issue of whether the Edens had prior experience filing a claim for 37-10953 as the *Order Denying Motion to Set Aside; Order Denying Motion to File Late Claim* at 9, n. 7, incorrectly finds: "The Movants previously filed a claim in the SRBA for water right 37-10953, which was ultimately decreed in 2002. ..." R Vol. I, p. 379, fn. 7. Actually, as the State admits, a 2002 IDWR printout in the record reflects that this claim for 37-10953 was submitted by the Edens' predecessors in 1988, not by the Edens who succeeded to ownership after claim submission. R Vol. I, p. 334, n. 1. Perhaps, if the District Court had not been under the mistaken impression that the Edens had prior experience filing a claim for water right 37-10953, the District Court would have been more understanding of the Edens' attempt to file a claim for water right 37-864. In any event, to find that the Edens had previously submitted a claim for a water right in the SRBA is not supported by the court record and is, in fact, controverted by admissions in *Respondent's Brief.*

important property rights a person can hold in Idaho, a water right, is taken by default. *Finality above all else*, as the State seeks, would be the symptom of an unjust legal system; *Finality with fairness* is what the U.S. and Idaho Constitutions, and applicable statutes and Court Rules, provide for here.

The circumstances of this case are clearly unique. None of the cases cited by the State involved circumstances where the water user submitted documents to IDWR in an attempt to file a claim for a water right or where IDWR committed errors in the handling of the claim of a water user or where the SRBA Court made a clearly erroneous finding of fact that the *Second Round Service Notice* had been served. The constellation of **uncontroverted** IDWR oversights leading to an improper default judgment for 37-864 being taken against the Edens, any one of these errors being material and sufficient for relief, should be properly remedied, rather than ignored:

1. **IDWR used an incorrect mailing address to provide the Edens claim information, although IDWR had just received the Edens' written confirmation of their correct mailing address.**

IDWR received the Edens' confirmation of their correct mailing address together with enclosures attempting to claim 37-864, but then mis-addressed the May 19, 2005, follow up letter with the claim form and further information required to complete the Edens' claim for 37-864. R Vol. I, pp. 214, 229. The Edens never received this IDWR follow up letter and did not know that IDWR had rejected their claim to 37-864 and that they had more to do to make a valid claim to protect their water right. *Affidavit of Gary Eden*, R Vol. I, p. 231, ¶3; *Affidavit of Glenna Eden*, R Vol. I, pp. 238-39, ¶3. This is a material error by IDWR because it resulted in the Edens not receiving vital information for filing a claim for water right 37-864 . The Edens

have established that they would have submitted a claim in compliance with the terms of the May 19, 2005, letter if they had received it. R Vol. I, p. 231, ¶3; pp. 238-39, ¶3.

It is undisputed that at the time of the May 19, 2005, IDWR letter, IDWR had the correct mailing address for the Edens, having recently received their written address confirmation. R Vol. I, pp. 214, 229. The misaddressed May 19, 2005, IDWR letter effectively rejected the Edens' attempted claim for 37-864 and enclosed a claim form, claim form instructions and other information that the Edens needed to have in order to comply with the requirements for filing a claim. R Vol. I, p. 229. Without receiving this misaddressed letter, the Edens were not informed the claim they had submitted to IDWR was not adequate and effectively were denied the IDWR claim filing assistance the purported *Second Round Service Notice* promises. To make matters worse, IDWR and the State have failed to produce for the record, the claim documents submitted by the Edens so there is no way for Edens to prove what they submitted and no way for the Court to confirm whether IDWR correctly refused to accept these dociments as a claim. IDWR expressly acknowledged that it received "enclosures" from the Edens and that these enclosed documents were sufficient for the IDWR to conclude that the Edens "would like to file a claim on 37-864." R Vol. I, p. 229. Yet, for unconfirmed reasons, IDWR refused to treat these documents as an actual claim. *Id.*

2. In violation of Idaho Code § 42-1408(5), IDWR filed with the SRBA Court, a fatally defective affidavit for proof of service of the *Second Round Service Notice*.

The SRBA Court, in its decision below, erroneously relied upon the defective *Affidavit of Danni M. Smith Re: Second Round Service of Commencement Notice for Basin 37, Part 1*

("*Smith Affidavit*") in making the finding of fact that the SRBA Court record established that the statutorily required *Second Round Service Notice* had been validly served on the Edens. R Vol. I, pp. 377-78, n.3, p. 380.

Idaho Code § 42-1408(4) provides for a second round of service of notice of the order commencing a general water rights adjudication ("*Second Round Service Notice*") to the record owners of land associated with unclaimed water rights, in an attempt to ensure that these property owners are aware of the need to claim their water rights:

> Upon expiration of the period for filing notices of claims, the [IDWR] director shall conduct a second round of service in conformance with this subsection. The director shall compare the notices of claims with department records and other information reasonably available to determine whether there are any rights to water from the water system for which no notice of claim was filed. In the event the director determines that not all claimants have filed claims, the director shall make a reasonably diligent effort in accordance with the court order to determine the land to which the possible claim is appurtenant, the last known owner of that land, and the last known address of that owner. The director shall prepare a second round notice of order. The director shall serve this notice on the last known owner.... The notice shall contain the information specified in subsection (1) of this section....

The Edens, as the record owners of the 40 acres associated with previously decreed but unclaimed Water Right No. 37-864, were entitled to personal service of such *Second Round Service Notice*. R Vol. I, pp. 254-58.

Idaho Code § 42-1408(5) further provides that "[t]he director shall file with the district court such proof of service as may be required to demonstrate compliance with the above requirements." In this case, the IDWR director apparently filed the *Smith Affidavit* with the

SRBA Court in 2005 in an attempt to comply with Idaho Code § 42-1408(4)&(5). *See* R Vol. I, pp. 924-932. The failure of IDWR to include a copy of the *Second Round Service Notice* with the *Smith Affidavit*, although it was referenced as Exhibit A, is a material error because without Exhibit A, the *Smith Affidavit* does not establish what was served and, whether, what was served substantively complied with statutory and due process requirements. *Id.* Further, the *Smith Affidavit's* failure to have a properly marked mailing list marked as Exhibit B, also raises questions about who actually was served. *Id.* Thus, the *Smith Affidavit* does not definitively establish either what was served or who was served. Nevertheless, the District Court relied upon this defective affidavit filed by IDWR to make a finding in the *Order Denying Motion to Set Aside; Order Denying Late Claim* ("*Order Denying Motions*") that the Edens had been properly served with the statutorily required *Second Round Service Notice*. R Vol. I, pp. 377-78, n.3. This finding is clearly erroneous because the *Smith Affidavit* is fatally defective and does not support the District Court's finding. This clearly erroneous finding alone justifies vacating the *Order Denying Motions* and setting aside the *Final Unified Decree* with respect to Water Right No. 37-864.

It is well established that the appellate function of the Supreme Court is to ascertain whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Owen v. Boydstun,* 101 Idaho 31, 624 P.2d 413 (1981). Even where the evidence is entirely in written form, the standard of review of a district court's findings of fact is whether they are clearly erroneous. *Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc.,* 107 Idaho 286, 688 P.2d 1191 (Ct. App. 1984). Where the trial court's findings of fact are clearly

erroneous and against the weight of the evidence, those findings will be set aside on appeal. *State ex rel. Kidwell v. Master Distrib., Inc.,* 101 Idaho 447, 453, 615 P.2d 116, 122 (1980). Based on these legal authorities and the absence of evidence in the record for the lower court's finding of fact regarding second round service, the *Order Denying Motions,* the *Order Closing Claims Taking Basins 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, and 63, and Disallowal of Unclaimed Water Rights ("Disallowal Order")* and the *Final Unified Decree* should be set aside with respect to Water Right No. 37-864.

3. In violation of I.R.C.P. 55(b)(2), IDWR failed to serve the Edens personally with a Three-Day Notice of Intent to Take Default, prior to seeking the disallowance of Water Right No. 37-864 in default against them.

IDWR's failure to personally serve the Edens with the required I.R.C.P. 55(b)(2) notice of intent to take default, resulted in judgment of disallowance of Water Right No. 37-864 being taken in default against the Edens without their knowledge. *Disallowal Order; Final Unified Decree;* R Vol. I, pp. 110-205 at 150; pp. 933-1140 at 956.

Idaho Rule of Civil Procedure 55(b)(2), in effect in 2013 and 2014 when the decrees of disallowal of 37-864 were entered in default (*Disallowal Order* and *Final Unified Decree*), required that notice of intent to seek default be served three days prior upon a party who has appeared personally or by a representative. I.R.C.P. 55(b)(2)(2004) (copy included in Addenda to *Appellants' Brief*). The "appearance" required to trigger the three-day notice requirement of this Rule has been broadly defined, and is not limited to a formal court appearance. Conduct which indicates an intent to defend, such as the Edens' attempted claim for 37-864, can constitute an appearance within the meaning of the Rule. *Newbold v. Arvidson,* 105 Idaho 663,

666, 672 P.2d 231, 234 (1983). The failure to comply with the notice of intent to seek default requirement of Rule 55 justifies setting aside the default judgment that is entered against such party where a meritorious defense is shown. *Id.* The Idaho Rules of Civil Procedure, and specifically Rule 55, have been determined to apply to SRBA proceedings. *See In re SRBA Case No. 39576,* 128 Idaho 246, 258, 912 P.2d 614, 626 (1995), discussed further below. Thus, the Edens, who had attempted to claim 37-864 and whose mailing address was known, should have received this notice prior to default being entered. But, alas, such Rule 55(b)(2) notice of intent never was sent to them.

IDWR and the State failed to provide the Edens this three-day notice both times (in 2013 and 2014) they sought and obtained by default the decree of the District Court disallowing Water Right No. 37-864 because it was unclaimed. As discussed further below, the District Court erroneously found and concluded that a decree of water right disallowance is not a judgment, that the authority for the entry of a decree of disallowance is governed by statutes, rather than by the Idaho Rules of Civil Procedure, and that compliance with Rule 55(b) is not required when a default judgment disallowing unclaimed water rights is entered by the SRBA Court. *Order Denying Motions* at 3-4, n.3, R Vol. I, pp. 377-78, n. 3.

The failure of IDWR and the State to serve this three-day notice obviously is material because if such notice of intent to take default had been served on the Edens, they would have responded to the notice and taken action to protect their interest in water right 37-864. *See* R Vol. I, pp. 231, 238-39. Because they did not receive such notice or any other communication on the matter, they relied upon their prior submission to IDWR and did nothing further to protect

their water right until they learned from the Watermaster that their water would not be delivered as it had been in the past. R Vol. I, pp. 231, 356. This failure to comply with the three-day notice requirement of I.R.C.P. 55(b) justifies vacating the *Order Denying Motions* and setting aside the *Disallowal Order* and the *Final Unified Decree* with respect to Water Right 37-864.

4. **Also in violation of I.R.C.P. 55(b)(2), IDWR failed to provide the Court Clerk written certification of the name of Edens and the address most likely to give the Edens notice of default judgment with respect to Water Right No. 37-864, so the Clerk could give the Edens notice that judgment of disallowance of 37-864 had been entered in default.**

I.R.C.P. 55(b), in effect at the time, also required the SRBA Court Clerk to be provided written certification of the name of Edens and the address most likely to give them notice, so the Clerk could give the Edens notice that judgment of disallowance of 37-864 had been entered in default. However, neither the State nor IDWR, as applicants for default judgment, gave the SRBA Court Clerk this information and, therefore, no such notice of default judgment was provided to the Edens. This error is material because the failure to provide the Clerk with the written certification of the name of Edens and their mailing address, information which IDWR possessed, prevented the Clerk from providing the Edens notice that default judgment had been entered for 37-864. Had the Edens received this notice, they could have and would have immediately responded to that information and taken appropriate actions to protect their water right from permanent loss. *See Affidavit of Gary Eden,* R Vol. I, p. 231, ¶3; *Affidavit of Glenna Eden*, R Vol. I, pp. 238-39, ¶3. This failure to comply with the I.R.C.P. 55(b) post-judgment notice requirement additionally justifies vacating the *Order Denying Motions* and setting aside the *Disallowal Order* and the *Final Unified Decree* with respect to Water Right No. 37-864.

As discussed further below, under applicable legal authorities, any one of these four material IDWR oversights is a sufficient basis for granting the Edens the relief they seek, while the State's attempt to blame the Edens, in the interest of securing ultimate finality, does not comport with applicable law and does not serve the interests of justice.

B. The Partial Decree of Disallowal of Water Right No. 37-864, Entered in Default, Should Be Set Aside under I.R.C.P. 60(b)(4), Because the Record Does Not Support the District Court's Finding that the Statutorily Required *Second Round Service Notice* Was Served on the Edens.

The State asserts that the Edens' argument regarding the defective S*mith Affidavit* was not raised below and, therefore, is waived. *Respondent's Brief* at 15. Actually, applicable authorities, including I.R.C.P. 52, do not support waiver in this instance, but, rather, allow for the lower court's clearly erroneous finding based on the defective *Smith Affidavit* to be raised on appeal.

The record before this Court unequivocally establishes that the *Smith Affidavit,* which the District Court relied upon to support its finding that the Edens were served with the statutorily required *Second Round Service Notice*, is incomplete and defective. *See Order Denying Motions at* 6, R Vol. I, p. 380; *Smith Affidavit*, R Vol. I, pp. 924-32. The *Smith Affidavit* that was filed by IDWR as proof of second round service is facially defective because it omits Exhibit A, the copy of the *Second Round Service Notice,* and has no marked Exhibit B, the mailing list of purported recipients of the *Second Round Service Notice*. *Appellants' Brief* at 17; *Smith Affidavit*, R Vol. I, pp. 924-32. Therefore, the *Smith Affidavit* that IDWR filed with the SRBA Court cannot, and does not, establish that the Edens were served with the *Second Round Service Notice.* Thus, the finding of fact of the District Court that the Edens were properly served with

the *Second Round Service Notice* is clearly unsupported by the record and is erroneous. The Edens' argument is based on the discovery, after this Appeal was filed, when the Clerk's record was prepared, that the *Smith Affidavit* in the SRBA Court record was defective. R Vol. I, p. 695. The Edens then asserted in *Appellants' Brief* that the finding of fact made by the District Judge that the Edens received second round service, as required by Idaho Code § 42-1408, was clearly erroneous because it was based on the fatally defective *Smith Affidavit* filed by IDWR. *Appellants' Brief* at 16-22.

The District Court's finding of fact that the *Second Round Service Notice* was served in compliance with Idaho Code § 42-1408 is clearly erroneous for the fundamental reason it is not supported by evidence "in the record." The essential appellate function of the Supreme Court is to ascertain whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Owen v. Boydstun,* 101 Idaho 31, 36, 624 P.2d 413, 418 (1981). Considering the letter and spirit of I.R.C.P. 52, the Rule which concerns findings of facts and conclusions of law, even where the evidence is entirely in written form, as here, the standard of review of a district court's findings of fact is whether they are clearly erroneous. *Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc.,* 107 Idaho 286, 290, 688 P.2d 1191, 1196 (Ct. App. 1984) (citing *Avondale on Hayden, Inc. v. Hall,* 104 Idaho 321, 658 P.2d 992 (Ct. App. 1983). Where the trial court's findings of fact are clearly erroneous and against the weight of the evidence, those findings will be set aside on appeal. *State ex rel. Kidwell v. Master Distrib., Inc.,* 101 Idaho 447, 453, 615 P.2d 116, 122 (1980) (citing *Russ Ballard and Family Achievement Institute v. Lava Hot Springs Resort, Inc.,* 97 Idaho 572, 548 P.2d 72 (1976); I.R.C.P. 52(a)).

The defects in the *Smith Affidavit* IDWR filed with the SRBA Court were not discovered by the parties or the District Court until after the *Order Denying Motions* was issued by the SRBA Court, this appeal was filed, and the Clerk's record was prepared and submitted to the parties. Without knowledge of this error in the record, it was not possible for Appellants to raise the issue before the District Court. I.R.C.P. Rule 52(a)(1) apparently envisions that such defects in the evidentiary record may be discovered at later stages: "A party may raise the question of the sufficiency of the evidence to support the findings whether or not the party raising the question has made an objection to the findings or a motion to amend them or a motion for judgment." Under Rule 52, the failure to raise the issue of the inadequacy of the affidavit to support the findings of the District Court, does not bar a party from raising the issue on appeal. Thus, the State's contention that the Edens' right to raise this issue on appeal was waived because the Edens did not raise the issue before the District Court is not supported by I.R.C.P. 52.

Moreover, the State's contention that the Edens waived the right to raise this issue on appeal is not supported by case precedent, not even by those cases that are referred to by the State. The State cites to *Deiter v. Coons,* 162 Idaho 44, 47, 394 P.3d 87, 90 (2017) (quoting *Clements Farms, Inc. v. Ben Fish & Son,* 120 Idaho 185, 207, 814 P.2d 917, 939 (1991)). *Deiter*, *Clements Farms* and the other cases preceding *Deiter,* holding that a new theory cannot be employed on appeal to attack a judgment, are clearly distinguishable and inapplicable to the case at hand. None of these cases involved a situation where the district court made findings that are clearly unsupported by the record or a situation where a party lacked knowledge of the

defective court record, such as in this case. *Deiter* and the prior cases all involved situations where a party had knowledge of all relevant facts and could have asserted the omitted legal theories in the lower court. Moreover, none of these cases involved an appeal in which it was asserted that the lower court committed clear error in its findings of fact and conclusions of law, as is the case now before this Court.

Deiter v. Coons involved claims against a person who sold a steer for slaughter that was later contaminated with E. coli bacteria by the slaughterer and also against persons to whom the slaughterer delivered the carcass for processing into packages of meat. In their complaint, Deiter alleged various theories of liability against the processors, but the only theory they presented to the district court was that the processors were negligent *per se* based upon their violation of various provisions of the Federal Meat Inspection Act. On appeal, Deiter argued additional theories that they contend would support a claim against the processor for negligence *per se*, but the Supreme Court refused to consider them because they were not argued in the district court, stating, "'An appellant is bound by the issues and theories upon which the case was tried below. Although a judgment may be sustained upon any legal theory, a new theory cannot be employed on appeal to attack the judgment.' *Clements Farms, Inc.,* 120 Idaho at 207, 814 P.2d at 939." *Deiter,* 162 Idaho at 53, 394 P.3d at 96 (2017).

Clements Farms, Inc. v. Ben Fish & Son involved claims alleging breach of implied warranty of fitness for a particular purpose because a crop of beans, which had been planted with seeds provided by Defendant, did not mature before the growing season ended. The trial court found breach of an implied warranty of fitness, which the Court of Appeals affirmed. The

Supreme Court granted review of the opinion of the Court of Appeals. Before the Supreme Court, the appellant tried to assert a new theory of damages which the Supreme Court refused to consider because it had not been raised in the district court. The Court stated: "An appellant is bound by the issues and theories upon which the case was tried below. Although a judgment may be sustained upon any legal theory, a new theory cannot be employed on appeal to attack the judgment. *Beaupre v. Kingen,* 109 Idaho 610, 710 P.2d 520 (1985); *Heckman Ranches, Inc. v. State,* 99 Idaho 793, 589 P.2d 540 (1979). Because the lost profits theory of damages was not framed below, it is not properly before this Court on appeal. We will not pursue it further." *Clements,* 120 Idaho at 207, 814 P.2d at 939.

Appellants have researched the line of cases preceding *Deiter* looking for any case that might contain facts similar to the case at hand. Appellants found none. Appellants describe in the Addendum hereto each of these cases going back to *Cox v. Cox*, 84 Idaho 513, 393 P.2d 929 (1962). These cases all involved situations where a party had knowledge of the relevant facts and could have raised an issue or a theory in the lower court, but failed to do so and was denied the right to do so for the first time on appeal. The case at hand is clearly distinguishable from the cases discussed above and in the Addendum where a party was not allowed to present legal theories on appeal which were available, but were not presented to the court below. None of these cases involved the trial court committing clear error by entering findings of fact unsupported by the evidence or the parties and the court discovering a defect in court records after the preparation of the Clerk's record on appeal. The State's contention that the Edens waived the right to challenge the clearly erroneous second round service finding of fact because

they did not raise this issue before the District Court is not supported either by I.R.C.P. 52 or by the case law.

C. The Partial Decree of Disallowal, Entered in Default, Should Be Set Aside Under I.R.C.P. 60(b)(4), Because the Edens Were Not Personally Served with the Required Three-Days Notice of Intent to Take Default Pursuant to I.R.C.P. 55(b).

In its *Response Brief*, the State asserts that the District Court correctly concluded that due process did not require that the Edens be personally served with three-days notice of the *Closure Order (*herein *"Disallowal Order"). Response Brief* at 25-30. This assertion actually misconstrues the allegation of Appellants with regard to I.R.C.P. 55(b)(2). Rather than asserting a due process violation here, Appellants raise the three-day notice requirement as a Rule 55(b)(2) issue: "The District Court also should have set aside under I.R.C.P. 60(b)(4) the Partial Decree of Disallowal of Water Right No. 37-864 that was entered in default because the Edens were not personally served with notice of the default, as was required by I.R.C.P. 55(b)(2)." *Appellants' Brief* at 23. The requirements of Rule 55(b)(2), in effect at the time the 2013 *Dismissal Order* and the 2014 *Final Unified Decree* were entered in default with respect to 37-864, are the proper focus here.

In the *Order Denying Motions,* the District Court ruled that "[t]he Movants are not entitled to relief under Rule 60(b)(4) on the grounds that the Court failed to comply with Rule 55." *Order Denying Motions* at 6*; R Vol. I, p. 380.* In support, the District Court held that "[t]he disallowal of an unclaimed water right in a general adjudication is not a default judgment. Such a disallowal is not entered pursuant to the procedures set forth in Rule 55. To the contrary, the disallowal is entered pursuant to, and by operation of, statute. Idaho Code § 42-1420 provides

that the failure to file a required notice of claim for a water right in a general adjudication will result in that water right being lost. Idaho Code § 42-1420. . . . Therefore, the Movants' argument that Rule 55 is applicable to this Court's disallowal of an unclaimed water right is unavailing." *Id.* In this manner, the District Court deprived the Edens of an important property right without recognizing and providing them the procedural protections they are entitled to receive under I.R.C.P. 55(b)(2).

The decision of the District Court fails to recognize the difference between the substantive law that governs the ownership of water rights and the procedural law that governs the judicial process for granting or disallowing water rights. The substantive law is established by the Idaho Legislature; but the procedural law is established by the Idaho Supreme Court. *See* Const., Art. 5, Sec. 13; Idaho Code §§ 1-212 and -213. *See also*, *Lawrence Warehouse Co. v. Rudio Lumber Co.,* 89 Idaho 389, 397, 405 P. 2d 634, 638 (1965) ("Previously existing statutory provisions governing issuance of injunctions, to the extent that they are purely procedural, and to the extent that they are in conflict with applicable rules of IRCP, are of no further force or effect. I.C. § 8-411 is a procedural statute. To the extent that its provisions may be in conflict with IRCP rules 65(a) and 52(a), it is no longer in force or effect."); *In re SRBA Case No. 39576,* 128 Idaho 246, 258, 912 P.2d 614, 626 (1995). The Supreme Court's inherent authority to make rules governing procedure and, by rule, to make inapplicable, procedural statutes which conflict with procedural rules also was recognized in *State v. Griffith,* 97 Idaho 52, 58, 539 P.2d 604, 610 (1975):

> While the legislature has authorized this Court to formulate rules of procedure, this Court has the inherent authority, made especially

> clear by the amended provisions of Article V, Section 2, of the Idaho Constitution, to make rules governing procedure in the lower courts of this state. *R. E. W. Construction Co. v. District Court of the Third Judicial District.* The legislature need not repeal statutes made unnecessary by, or found in conflict with, court reorganization and integration. It is well settled in this state, as part of the rule-making power possessed by this Court, that the Court may by rule, as in the case of Rule 27 of the Rules of Court for the Magistrate's Division of the District Court and District Court, make inapplicable procedural statutes which conflict with our present court system.

The concepts which distinguish between the power of the Legislature to enact laws that govern substantive rights to own water and the power of the judicial branch to make rules that govern the court procedures by which those rights are judicially regulated was recognized and applied in *In Re SRBA Case No. 39576,* 128 Idaho 246, 912 P.2d 614 (1995). That case resolved issues relating to the scope and application of the SRBA statutes in the courts of Idaho. The Legislature had enacted statutes which implicated *inter alia*: 1. Expanding the SRBA Court's jurisdiction to decree provisions controlling the administration of water rights by IDWR; and 2. Modifying the SRBA process with respect to costs and attorneys' fees, mandatory settlement conferences, expert witness testimony, the admissibility of evidence and the legal weight to be attributed to evidence.

The Supreme Court confirmed that the judicial branch has procedural rule-making authority under the Idaho Constitution. The Court stated:

> Article Five of the Idaho Constitution provides for and governs the powers of the judicial branch of government. The section of that Article governing the powers of the Legislature and the courts to enact procedural rules provides:

> POWER OF LEGISLATURE RESPECTING COURTS. The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution, provided, however, that the legislature can provide mandatory minimum sentences for any crimes, and any sentence imposed shall be not less than the mandatory minimum sentence so provided. Any mandatory sentence so imposed shall not be reduced.
>
> Idaho Const. art. V, § 13.

In re SRBA, 128 Idaho at 253, 912 P.2d at 621. The Court also recognized that Article V, Section 13 of the Idaho Constitution provided a shared power to enact "methods of proceeding" in the district courts "when necessary," meaning "only where the 'method of proceeding' has not otherwise been regulated, or where changing time has required further or different regulation, then the legislature shall regulate such matters." *Id.,* 128 Idaho at 254, 912 P.2d at 622. Applying this authority, the Court ruled that the Legislature acted within its constitutional authority by establishing procedures necessary to commence the SRBA. *Id.,* 128 Idaho at 255, 912 P.2d at 623. The Court noted that water right adjudications present unique circumstances, often requiring a departure from established rules of procedure, and that when the SRBA was authorized by statute in 1986, no reasonable method of initiating the proceeding or providing notice to potential claimants existed and "in light of the absence of applicable Rules of Civil Procedure, it was necessary for the Legislature to provide special procedural rules for the initiation of the SRBA." *Id.,* 128 Idaho at 255, 912 P.2d at 623 (emphasis added). It must be

emphasized that the ruling of the Court in this regard applied only to the *initiation of the SRBA.* As discussed below, the Court also specifically found that Rule 55 applied in the SRBA to the procedure for entry of default, such as a default judgment disallowing a water right.

In *In re SRBA,* the Court further ruled that the 1994 adjudication statutes were a proper exercise of legislative authority to the extent those statutes prescribed substantive law or did not conflict with the rules of the Court. *Id.,* 128 Idaho 255, 912 P.2d at 623. The Court described the distinction between the legislative power to enact substantive laws and the Court's rulemaking power that governs procedure in the courts, as follows:

> The Idaho Constitution vests the power to enact substantive laws in the Legislature. Idaho Const. art. III, § 1; see also *Mead v. Arnell,* 117 Idaho 660, 664, 791 P.2d 410, 414 (1990) ("[O]f Idaho's three branches of government, only the legislature has the power to make 'law.'"). This power it not restricted by the Court's authority to enact rules of procedure to be followed in the district courts. *State v. Beam,* 121 Idaho 862, 863, 828 P.2d 891, 892 (1992) ("[T]his Court's rule making power goes to procedural, as opposed to substantive, rules."). This Court has adopted the standard for delineating substantive laws from procedural rules promulgated by the Washington Supreme Court in *State v. Smith*, 84 Wash.2d 498, 527 P.2d 674 (1974). In *Smith*, the Washington Supreme Court observed that substantive law "creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *Id.* at 501, 527 P.2d at 677, quoted in *Beam,* 121 Idaho at 863-64, 828 P.2d at 892-93.

128 Idaho at 255, 912 P.2d at 623.

Applying this legal authority, the Court ruled that it was within the Legislature's power to enact Idaho Code § 42-1411(4)(1994), which provides that the Director's report "shall constitute *prima facie* evidence of the nature and extent of the water rights acquired under state law." This

was so because Idaho Rule of Evidence 301, which governs the treatment of presumptions in the courts, expressly provides that statutory presumptions shall be given effect as provided in the statute that creates the presumption. In effect, there was no conflict between the statute that created the presumption and the evidentiary rule that applied it as a *prima facie* presumption which may be rebutted by contrary evidence in the court proceedings.

With respect to the statutory prohibition against awards of costs and attorney fees against the State in a general water adjudication, in Idaho Code § 42-1423 (1994), the Court held it is a legitimate exercise of the Legislature's substantive authority. "However, the Legislature's removal of state agencies from potential liability for awards of costs and fees does not deprive the district court of its inherent authority to assess sanctions for bad faith conduct against all parties appearing before it." *In Re SRBA*, 128 Idaho at 256, 912 P.2d at 624. But, the Court also held that the treatment afforded the IDWR Director as an "independent expert and technical assistant" in the SRBA under Idaho Code § 42-1401B(1) (1994) would be governed by the Idaho Rules of Evidence which concern the treatment of expert witnesses in court proceedings, rather then as provided in the statute, which would be of no effect. *In Re SRBA,* 128 Idaho at 258, 912 P.2d at 626.

Most germane to the District Court's refusal to apply I.R.C.P. 55 here, is this Court's analysis of Idaho Code § 42-1411(4) (1994), which stated that provisions in the SRBA Director's reports to which no objections are filed "shall be decreed as reported." This Court found this to be in conflict with both the Rules of Civil Procedure and the constitutional authority of the courts as a coordinate department of government. This Court stated:

> The requirement of I.C. § 42-1411(4) (1994) that provisions in the Director's report to which no objections are filed "shall be decreed as reported" is in conflict with both the Rules of Civil Procedure and the constitutional authority of the courts as a coordinate department of government. Under the 1986 statutory framework, the district court was required to admit unobjected to portions of the Director's report "as true facts." I.C. § 42-4212(9) (1986). However, the provision in the 1994 statutes that the district court shall decree the unobjected to portions of the Director's report as those provisions are reported removes the authority of the courts to apply the facts to the law and render a conclusion. The removal of this authority contradicts the rules established by this Court for entry of default judgment and divests the court of the power to correct even an egregious error that might eliminate or impair constitutionally recognized water rights. As this Court observed in an early case involving the adjudication of water rights, "the plaintiff, after taking default, must apply to the court for the relief demanded in the complaint; in other words, must establish by proof the material allegations of his complaint." *Joyce,* 23 Idaho at 304, 130 P. at 796.
>
> The procedure to be followed by the district court where no objection has been raised is established by the rules for entering a default judgment in civil actions, set out in I.R.C.P. 55. . . .
>
> Although a general water adjudication is a unique type of proceeding, such an adjudication is nonetheless a suit within the original jurisdiction of the district court, as conferred by Article V, Section 20 of the Idaho Constitution. In *Mays* this court explained:
>
> > The district court has original jurisdiction in all cases, both at law and in equity (Const., art. 5, sec. 20) "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a co-ordinate department of the government." (Const., art. 5, sec. 13.) One has a right to invoke the jurisdiction of the courts to protect his right to the use of water for irrigation....

In Re SRBA, 128 Idaho at 258; 912 P.2d at 626 (emphases added).

It is clear from the rulings of this Court in *In Re SRBA,* that the Legislature did not have the authority to authorize the SRBA court to disregard I.R.C.P. 55 and enter a default judgment which deprived Edens of their right to the use of water for irrigation under 37-864 until the IDWR complied with the Idaho Rules of Civil Procedure and gave the Edens three days notice of intent to take default. The District Court committed clear error when it ruled in the *Order Denying Motions* that disallowal of an unclaimed water right in a general adjudication is not a default judgment and that such disallowal is entered pursuant to, and by operation of, statute, and that, therefore, compliance with I.R.C.P. 55 was unnecessary. Contrary to the decision of the SRBA Court, compliance with I.R.C.P. 55's default notice requirement was necessary and the failure to do so is sufficient grounds to vacate the *Order Denying Motions* and to set aside the *Disallowal Order* and the *Final Unified Decree* with respect to Water Right 37-864.

The State's argument in *Respondent's Brief* that personally serving the Edens with three-days notice would not have been practical because of the number of water rights that were unclaimed is without merit and does not excuse the State of the obligation to serve the Rule 55 notice in this instance. *See Respondent's Brief* at 28. First, we are dealing here only with water right 37-864 owned by Edens – no other water rights are at issue here; second, Rule 55(b)(2), while limited to those who have appeared, does not qualify the obligation to serve the three-day notice only if it is practicable to do so; and third, IDWR previously did not find it impracticable to send a letter to the Edens to confirm their correct mailing address or to send a (mis-addressed) letter to inform them that they needed to submit a formal claim and pay a fee. IDWR had the

Edens' correct address on file and easily could have put a notice in the mail to Edens that their Water Right No. 37-864 was the object of a planned entry of default judgment.

The State also argues that Rule 55(b)(2) is not applicable to the Edens because it only would require three-day notice to be given when a party appeared and the Edens had not appeared with respect to 37-864. *Respondent's Brief* at 28-29. However, this position is inconsistent with this Court's broad interpretation of what constitutes an "appearance" in this context: "An appearance triggering the requirement of the three-day notice has been broadly defined and conduct on the part of the defendant which indicates an intent to defend against the action an appearance within the meaning of the rule." *Catledge v. Transp. Tire Co. Inc.*, 107 Idaho 602, 606, 691 P.2d 1217, 1221 (1984). The Edens became entitled to the protections of Rule 55(b) when they submitted their documents to IDWR in an attempt to file a claim and thereby put IDWR on notice that they intended to claim water right 37-864 in the SRBA. IDWR acknowledged receipt of these documents and the Edens' attempted claim in the May 19, 2005, mis-addressed letter. R Vol. I, p. 229. In the SRBA, it is IDWR that typically accepts the water right claims from water right holders and then evaluates them before reporting their recommended elements in Director's reports filed with the SRBA Court. *See* Idaho Code § 42-1409(4). Thus, in the SRBA, the ordinary way to claim a water and to appear is through IDWR, as the Edens did.

The State's argument that the scope of an acceptable appearance should be restricted to the holding in *Meyers v. Hansen,* 148 Idaho 283, 288, 221 P.3d 81, 86 (2009) should be rejected. In *Meyers,* the Court stated: "[T]he defendant's actions 'must be responsive to plaintiff's formal

[c]ourt action,' so it is insufficient to simply be interested in the dispute or to communicate to the plaintiff an unwillingness to comply with the requested relief." But, *Meyers* was not an SRBA case and does not involve a water right; it was an action against former Congressman Hansen to collect an investment loss. In *Meyers,* a default was entered against Hansen and he was served with the default judgment. The *Meyers* case is clearly distinguishable from the Edens's case. A major difference between the "normal civil action" and the SRBA is the manner in which claimants make an appearance in the SRBA case and are deemed to be "parties." A party who seeks to submit a claim in the SRBA, files it with IDWR. Idaho Code § 42-1409(4). The filing of the claim makes one a party to the SRBA. *Id.* The Edens' submission to IDWR with the intent to submit a claim to 37-864, put IDWR on notice the Edens intended to claim water right 37-864 and amply constituted the Edens' appearance, under the broad definition enunciated in *Catledge.* Under the circumstances of this case, the Edens appeared as owners of Water Right No. 37-864 in the SRBA and were entitled to the three-day default notice under Rule 55(b).

D. The Partial Decree of Disallowal, Entered in Default, Should Be Set Aside under I.R.C.P. 60(b)(4), Because the Statutorily Required *Second Round Service Notice,* Purportedly Sent Pursuant to Idaho Code § 42-1408(4), Was Substantively Defective, under the Facts of this Case, Since the Edens Sought the Assistance of IDWR in Filing the Claim for Water Right No. 37-864, as the Purported Notice States, and IDWR Responded to the Edens at an Incorrect Address, Different from the Address the Edens Had Just Confirmed to IDWR, and, Therefore, the Edens Never Received that IDWR Response Rejecting their Prior Claim.

In the third 60(b)(4) alternative basis for setting aside the default, the Edens assert that the I.C. 42-1408 *Second Round Service Notice* that IDWR purports to have sent to the Edens was substantively defective under the facts of this case. Due to the defective *Smith Affidavit* that IDWR filed with the SRBA Court in June 2005, the record does not establish the actual content

of the *Second Round Service Notice* or whether the Edens actually received it. For the reasons discussed above and in the Edens' opening brief, the record's lack of the statutorily required proof of service (Idaho Code § 42-1408(5)) for the statutorily required *Second Round Service Notice* (Idaho Code § 42-1408(4)) is a separate and distinct procedurally based ground under 60(b)(4) for setting aside the default judgment for 37-864. In this independent third 60(b)(4) ground for setting aside the default, the defective substance of the purported *Second Round Service Notice* is the issue. Under this basis for relief, the Edens' position is that even if they would have received the *Second Round Service Notice* that IDWR now purports to have sent, that *Notice* would have been substantively defective, incorrectly, under the facts of this case, instructing that, "Assistance in filing Notices of Claims may be obtained at all offices of IDWR" and that "Notices of Claims must be filed on forms prepared by IDWR or a reasonable facsimile." R Vol. I, p. 221 (emphases added). The May 19, 2005, mis-addressed IDWR letter unequivocally confirms that the Edens had done exactly what the purported *Second Round Service Notice* states to no avail: 1. Sought the assistance of IDWR in claiming 37-864; and 2. Submitted documents to IDWR in an apparent attempt to claim 37-864: "I gathered from the enclosures you sent me that you would like to file a claim on 37-864." R Vol. I, p. 229. Because the IDWR assistance was mis-addressed and never received, the Edens never were informed that IDWR had rejected their claim and they never received the follow up information to submit an acceptable claim. R Vol. I, pp. 231, 238-39. Thus, in these respects, the purported *Second Round Service Notice* would have contained incorrect information that led the Edens astray in their effort to claim 37-864.

It is fundamental that notice which provides mis-information cannot satisfy either statutory notice requirements or due process as notice and an opportunity to be heard are fundamental to procedural due process. *Fuentes v. Shevin,* 407 U.S. 67, 80, 92 S. Ct. 1983 (1972). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652 (1950). This may include an obligation, upon learning that an attempt at notice has failed, to take "reasonable follow-up measures" that may be available. *Jones v. Flowers,* 547 U.S. 220, 235, 126 S. Ct. 1708 (2006) (state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed"; the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so.). The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S. Ct. 1011 (1970). Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it. *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S. Ct. 1187 (1965); *Robinson v. Hanrahan*, 409 U.S. 38, 93 S. Ct. 30 (1974); *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874 (1982).

Notice that is inadequate, incorrect or even ambiguous cannot satisfy due process. *See, e.g., Franck-Teel v State,* 143 Idaho 664, 672, 152 P.3d 25, 32 (Ct. App. 2006) (State failed to

provide adequate notice of purported deficiencies in petition for post-conviction relief pursuant to Idaho Code § 19-4906(b) and district court failed to provide required notice allowing twenty-days to respond before dismissing petition.); *Cherniwchan v. State,* 99 Idaho 128, 129, 578 P.2d 244, 245 (1978) (district court failed to notify appellant of its intention to dismiss application for post-conviction relief pursuant to Idaho Code § 19-4906(b)). Water rights, being among the most important of property rights in Idaho, have, since the State's earliest days, been deemed subject to strict due process protections. *Bear Lake County v. Budge,* 9 Idaho 703, 711, 75 P. 614, 616 (1904). In *Lu Ranching*, the Court quoted from the decision in *Bear Lake County,* "'reasonable service of summons is actual service upon all known defendants who reside in and can be found in the county when the suit is brought.'" *Lu Ranching,* 138 Idaho at 609, 67 P.3d at 88. Inherent in due process is satisfactory notice prior to judicial determinations affecting rights to life, liberty or property. *Id.*

Yet, *Respondent's Brief* does not squarely address the language in the purported *Second Round Service Notice* and whether under the facts of the case, this language would have taken the Edens down a wrong path and, therefore, have been fatally defective. Instead, without any references to statutory or case law, the State focuses on whether the Edens had a reasonable belief that they properly filed the claim, rather than the substantive adequacy of the purported *Notice.* However, the proper matter under legal scrutiny here is the purported *Notice* itself and, whether, under the facts of this case, the purported *Notice's* language would have been materially misleading and, therefore, could not satisfy either statutory or due process notice requirements.

When the language of the purported *Second Round Service Notice* is viewed in the context of the facts and circumstances in this case, it is irrefutable that this language would have taken the Edens down a wrong path, similar to the dead end path they actually did take. In the May 19, 2005, mis-addressed letter, IDWR acknowledges the receipt of enclosures sent by the Edens in their attempt to claim 37-864 in facsimile form, as the purported *Notice* states would be acceptable. R Vol. I, p. 229. Then, with this same letter, IDWR attempts to provide the follow up claim filing assistance that the purported *Second Round Service Notice* promises. R Vol. I, p. 229. However, the Edens never received this mis-addressed follow up assistance, although the Edens had recently provided IDWR written confirmation of their correct mailing address. R Vol. I, pp. 231, 238-39. Thus, under the facts and circumstances presented here, the purported *Second Round Service Notice* would have provided the Edens incorrect information about the possible use of facsimile forms and IDWR's availability to offer assistance.

While there is no proof in the record to substantiate that the purported *Second Round Service Notice* was sent to the Edens or actually received by them; it cannot be refuted that it would have led the Edens in the wrong direction, if they had received it. The purported *Second Round Service Notice*, if received, could have led the Edens to attempt to file a claim in facsimile form and to seek IDWR assistance with it. Under the facts of this case, that road would have led to a dead end, rather than claim filing success, with default being entered and invalidation of their Water Right No. 37-864.

E. The Partial Decree of Disallowal, Entered in Default, Should Be Set Aside under I.R.C.P. 60(b)(6), Because There Were "Unique and Compelling Circumstances," Including the Edens Confirming in Writing their Correct Mailing Address, and IDWR, Nevertheless, Then Using an Incorrect Mailing Address to Provide the Edens Information that their SRBA Claim for 37-864 Was Insufficient and Had Been Rejected.

The State opposes the Edens' 60(b)(6) claim for relief, asserting that: (1) it is actually a I.R.C.P. 60(b)(1) "mistake" claim; and (2) no "unique and compelling circumstances" justifying relief under Rule 60(b)(6) are presented. *Respondent's Brief* at 31-32. The State's position belies an incomplete understanding of the full nature of the Edens' 60(b)(6) claim. The State's limiting characterization of the Edens' 60(b)(6) claim to be based solely on having "mistakenly believed that they had filed a claim in the SRBA" does not take account of the full panoply of "unique and compelling circumstances" actually presented in this case:

1. It does not take account of the uncontroverted fact that the Edens' attempted to claim 37-864 and that IDWR unequivocally acknowledged this in its May 19, 2005, letter. R Vol. I, p. 229.
2. It does not take account of the uncontroverted fact that IDWR cannot identify the documents that the Edens submitted to IDWR in their attempt to claim 37-864.
3. It does not take account of the uncontroverted fact that the Edens promptly confirmed in writing their correct mailing address, as requested by IDWR. R Vol. I, p. 214.
4. It does not take account of the uncontroverted fact that despite having just received mailing address confirmation from the Edens, nevertheless IDWR used an incorrect mailing address to inform the Edens their attempted claim had been rejected and to provide follow up instructions. R Vol. I, p. 229.
5. It does not take account of the uncontroverted fact that it was not until 2015, over six months after entry of the SRBA *Final Unified Decree*, that the Edens first received personal notice that 37-864 had been decreed in default and that it may no longer be delivered by the watermaster. R Vol. I, p. 356.
6. It does not take account of the uncontroverted fact that no one other than the State has opposed the Edens, although the major

stakeholders in the SRBA and/or their representatives have received personal service of the Edens' *Motion to Set Aside Final Unified Decree and Disallowal Order* with respect to 37-864. . R Vol. I, pp. 259-274.

7. It does not take into account the Watermaster's uncontroverted factual assertion that, "In view of the long term existence of 37-864, I would not anticipate prejudice to other existing water users if it were reinstated." R Vol. I, p. 282.
8. It does not take into account that 37-864 is a well established senior previously decreed water right, and Idaho law disfavors its forfeiture. R Vol. I, p. 254-55.

To describe this case as simply involving "a mistaken belief that a claim had been filed," as the State does, ignores the totality of the circumstances that conspired to thwart the Edens' good faith attempt to claim 37-864 and the true nature of the overall situation militating in favor of granting the Edens relief under 60(b)(6).

There are not many cases in Idaho addressing the question, so what constitutes "unique and compelling circumstances" under I.R.C.P. 60(b)(6). In an early case under prior law, the Idaho Court upheld vacating a default judgment where the judge had sent a telegram to the attorneys for the defendant intervenor informing them that the cause would be set for hearing on "Tuesday next," but an error occurred in the transmission of said telegram, whereby the same was made to read, "Thum, against Pyke will be set for Thursday day next." When the defendant intervenor failed to appear on the actual hearing date, a default judgment was entered. The Court, on motion to vacate the judgment, ruled that the intervenor was prevented from having a hearing in the case through no fault of his own and was entitled to relief from the judgment. *Thum v. Pyke,* 6 Idaho 359, 362-63, 55 P. 864, 865-66 (1898). *See also*, *Berg v. Kendall,* 147 Idaho 571, 579, 212 P.3d 1001, 1009 (2009) (reversed district court and granted Rule 60(b)(6) relief on

behalf of a minor child where the parents and attorney failed to prosecute meritorious personal injury claims of minor child).

In *Dawson v. Cheyovich Family Trust,* 149 Idaho 375, 234 P.3d (2010), the district court in Teton County entered a default judgment against Dawson quieting a one-fourth interest in real estate to Bach. The relief granted by the district court in the judgment was inconsistent with the relief sought by Bach in his complaint. Dawson filed a motion to reconsider and an I.R.C.P. 60(b)(6) motion to set aside the judgment on the basis that the judgment was directly contrary to a default judgment that had been previously entered by a different judge of the district court in Teton County. Dawson asserted that he had a meritorious defense because he was not aware of the lawsuit in which the default judgment was entered until he received a phone call explaining that the default judgment had been entered. In response to the motion to set aside the judgment, the district court held that Dawson's lack of knowledge of the underlying lawsuit was not grounds to grant the motion for reconsideration, but, instead, served as grounds for an independent action. The district court did not rule on Dawson's Rule 60(b)(6) motion. Dawson appealed to the Idaho Supreme Court arguing that the district court erred by failing to rule on the 60(b)(6) motion, and by denying the motion for reconsideration and other grounds. The Supreme Court held that the district court erred by failing to issue a ruling on Dawson's Rule 60(b)(6) motion. In its decision the Supreme Court stated that the facts of the case "may constitute unique and compelling circumstances sufficient to justify relief under I.R.C.P. 60(b)(6)." 149 Idaho at 380, 234 P.3d at 704. In its decision, the Court stated:

> Under I.R.C. P. 60(b)(6), a court may relieve a party from a final judgment, order, or proceeding for "any … reason justifying relief

> from the operation of the judgment." Idaho R. Civ. P. 60(b)(6). "[A]lthough the court is vested with broad discretion in determining whether to grant or deny a Rule 60(b) motion, its discretion is limited and [the motion] may be granted only on a showing of 'unique and compelling circumstances' justifying relief. (citations omitted)
>
> The district court erred by failing to issue a ruling on Dawson's Rule 60(b)(6) motion. (citations omitted) ...
>
> Additionally, the facts of this case may constitute unique and compelling circumstances sufficient to justify relief under I.R.C.P. 60(b)(6). First and foremost, the relief granted by the district court in the September 11, 2007, opinion and quiet-title judgment, and the subsequent First Amended judgment, is inconsistent with the relief sought by Bach in his March 26, 2002, complaint in intervention. The district court is not authorized to grant relief that is inconsistent with the pleadings and evidence in the case. (citation omitted) ... Therefore , the discrepancy between Bach's complaint and the remedy ordered by the district court may be a unique and compelling circumstance upon which relief under a Rule 60(b)(6) motion may be justified.

149 Idaho at 381, 234 P.3d 706. The Court further explained that the district court had been misled with respect to the holding in the earlier Teton County judgment by the party who moved for entry of the default judgment and that because the misrepresentation served as the foundation for the district court's quiet-title judgment and first amended judgment, "sufficiently unique and compelling circumstances likely exist for the district court to grant Dawson's Rule 60(b)(6) motion to vacate the judgment and amended judgment." *Id.*

In *Maynard v. Nguyen,* 152 Idaho 724, 274 P.3d 589 (2011), the Court upheld the district court decision to vacate a default judgment under circumstances somewhat similar to those in the Edens' case. Maynard sued for damages for breach of a lease; Nguyen failed to appear at the hearing and a default judgment was entered in favor of Maynard. Subsequently, Nguyen moved

to set aside the default judgment which was granted. Maynard appealed. The facts reveal that after being served with the complaint, Nguyen wrote a letter to the "Honorable Judge, Mr. Eppink [counsel for Maynard], Janice Maynard and To Whom it May Concern" in which Nguyen asserted and explained a meritorious defense to the claims of Maynard. The letter reached Eppink and Maynard, but not the judge. At the evidentiary hearing on damages, Eppink told the judge he had received a letter with various documents attached which was addressed to the judge and asked if it had been received. When the judge said it had not been received, Eppink offered no further information and presented evidence concerning damages. The district court granted a default judgment. With their Rule 60(b)(6) motion, the Nguyens noted they had sent Maynard's attorney the letter explaining their version of events and why they thought they had a meritorious defense. *Maynard v. Nguyen*, 152 Idaho at 724-25, 274 P.3d at 590-91.

The district court granted the motion to set aside the default judgment, finding that the Nguyens had demonstrated there were unique and compelling circumstances justifying relief under I.R.C.P. 60(b)(6) because Maynard's attorney had failed to comply with Idaho Rule of Professional Conduct 3.3 and this lapse had resulted in prejudice to the Nguyens. The Court found that the letter sent by the Nguyens had asserted and explained a meritorious defense. On appeal, Maynard contended that the Nguyens never raised the issue of attorney misconduct in the I.R.C.P. 60(b)(6) motion, and that the district court exceeded its discretion in considering that ground. *Maynard v. Nguyen,* 152 Idaho at 725; 274 P.3d at 591. In its decision upholding the District Court decision to vacate the judgment, the Court stated:

> The district court did not abuse its discretion in concluding that unique and compelling circumstances justified the relief it granted

> to the Nguyens. The district court acted within its discretion in concluding that Maynard's counsel should have provided it with the letter and attached Three Days Notice at the default hearing because it did outline a meritorious defense. It was directed to the judge, and it obviously had a bearing on the judgment's outlook with regard to the case. As Maynard points out in her opening brief, Rule 3.3(d) of the Idaho Rules of Professional Conduct provides, "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer, that will enable the tribunal to make an informed decision, whether or not the facts are adverse." She continued, "Maynard and her counsel acknowledge, of course, that the *existence* of the letter was material to the default hearing, as was the letter's salutation –to 'The Honorable Judge.'" [emphasis in original]. When he learned of the content of the letter at a later date, the district judge obviously concluded that it contained information material to the issue at hand in the default hearing. While Maynard's counsel orally notified the judge of the letter at the hearing, there was no mention of the attached Three Days Notice, nor of the indication in the letter that the Nguyens were intent on defending against Maynard's claim. ...

152 Idaho at 730; 274 P.3d 595.

Federal Rule of Civil Procedure 60(b)(6) is similar to I.R.C.P. 60(b)(6) and both are intended to "accomplish justice":

> The leading case to construe [federal] Rule 60(b)(60 as providing a basis for relief from a judgment is *Klapprott v. United States,* 335 U.S. 601, 93 L. Ed. 266, 69 S. Ct. 384 (1949), in which Mr. Justice Black stated: "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice...." [T]he federal courts have generally applied clause (6) liberally whenever modification or vacation of a judgment appeared appropriate to accomplish justice....

Construction and Application of Rule 60(b)(6) of Federal Rules of Civil Procedure Authorizing Relief from Final Judgment or Order for "Any other Reason," 15 A.L.R. Fed. 193, at 32 (1973).

Denying the Edens the relief they seek pursuant to I.R.C.P. 60(b)(6) under the "unique and compelling circumstances" of this case would be an injustice; however, granting the Edens relief under I.R.C.P. 60(b)(6) would accomplish justice.

F. The District Court Improperly Denied the Edens' *Motion to File Late Notice of Claim* on the Basis that their *Motion to Set Aside the Partial Decree of Disallowal* Had Been Denied.

The State acknowledges that if any of the 60(b) grounds are granted, the next step would be for the Edens' *Motion to File Late Notice of Claim* to be considered. *Respondent's Brief* at 35. Typically, such Motions to File Late Notice of Claim are evaluated in the SRBA pursuant to the good cause standard of IRCP 55(c). *See SRBA Administrative Order 1; Rules of Procedure (AO1)*, Rule 4(d)(2)(d); R Vol. I p. 883. The State raises three reasons for opposing the Edens' Motion to File Late Claim: 1. prejudice; 2. finality; and 3. claim processing time. *Respondent's Brief* at 35-36. Each of these are addressed below.

Appellants' Brief explained that the prior 1918 Decree for Water Right No. 37-864 and the Edens' Deed for the water right's place of use established that the Edens have alleged a detailed meritorious case with respect to their claim to Water Right No. 37-864. *Appellants' Brief* at 31-32. The Edens also addressed the issue of prejudice in Appellants' Brief but the State in its brief nevertheless asserts that the water shortage in Basin 37 and the associated moratorium on new consumptive rights in that Basin would "prejudice junior water users by reducing the amount of legally available water and by allowing a new senior to assert priority." *Respondent's Brief* at 35. It appears that the "new senior" the State refers to here is intended to mean Water Right No. 37-864. But, actually, 37-864 is not a "new senior," that would be "newly" inserted

into the delivery hierarchy of water rights; but a senior (1896) water right that the record establishes was delivered up to 2015, after the entry of the SRBA *Final Unified Decree* on August 25, 2014. R Vol. I, p. 356.

The State reiterates its concern for finality, but its concern for "finality" actually appears to be the same as its concern for prejudice. The State suggests, without providing any specific factual support, that allowing the claim for 37-864 to proceed now would somehow have broad impacts to other water rights in the same water system. *Respondent's Brief* at 32-33. Actually, the factual record establishes the opposite: that Water Right No. 37-864 was delivered up to 2015 and that a permanent cessation of this 1896 water right which was decreed in 1918 for use on this same property is more likely to upset the apple cart than 37-864's continued delivery and use in accordance with historic practices. R Vol. I, pp. 281-82. Since Basin 37 has a moratorium in place and, therefore, is closed to new consumptive water rights, as the State has noted, there also should be no new junior water users that could be impacted by a resumption in the delivery of 37-864 which only ceased to be delivered in 2015. R Vol. I, p. 356. Indeed, the record reflects that even the Watermaster, the IDWR employee in the best position to know, does not anticipate any prejudice as a result of delivery of 37-864: "Typically, water right no. 37-864 is delivered during the first part of the irrigation season. Then, it is the practice for supplemental storage water from American Falls Reservoir District #2 to be delivered to the place of use. In view of the long term existence of 37-864, I would not anticipate prejudice to other existing water users if it were reinstated." *Affidavit of Kevin Lakey*, R Vol. I, pp. 281-82. Further, setting aside the *Disallowal Order and the Final Unified Decree* with respect to Water Right No. 37-864

need not affect the "finality" of the *Disallowal Order* and the *Final Unified Decree* with respect to other water rights. The void or voidable parts of the *Disallowal Order* and the *Final Unified Decree* relating to 37-864 can be separated from the other parts, and such parts can be vacated, leaving other water rights unaffected. *See, e.g., Backman v. Douglas,* 46 Idaho 671, 677, 270 P. 618, 619 (1928).

While raising a possibly "lengthy" claim processing time as another obstacle to granting the Edens' relief, the State actually fails to identify the anticipated timeframe or specifically explain why this timeframe should preclude granting the Edens relief. *Respondent's Brief* at 36. Nevertheless, in quoting the portion of the District's Judge's *Order Denying Motions* describing the late claim process, the State implicitly acknowledges that there is an available process for addressing a late claim, such as one for 37-864, in the SRBA:

> A motion to file a late claim must generally comply with docket sheet notice procedure. If granted, the Department must investigate the claim and file a director's report and provide a period of time for objection and responses. If the Department's recommendation is contested the process can take much longer.

Respondent's Brief at 36, *quoting Order Denying Motions*, R Vol. I, p. 382. In fact, the record reflects that the SRBA Court continues to process late claims, issuing a decree for one as recently as November 2016. R Vol. I, pp. 1203, 1215 (Water Right/Subcase No. 63-34203).

None of the three bases the State raises for denying the Edens' *Motion to File Late Claim* are sufficient: No prejudice to other water users is reflected in the record; rather, the record reflects that other water users are more likely to be affected by 37-864's cessation than its continued diversion in accordance with historic practices. The record, including the

watermaster's affidavit, actually supports the prevention of any prejudice by maintaining the historic *status quo* and reinstating 37-864. Also, the State points to no concrete information in the record supporting its assertion that the SRBA late claim process would be unduly "lengthy." Rather, the record reflects that the SRBA Court has a late claim process in place, a process which it continues to use. Quite simply, the State identifies no legitimate reason for denying the Edens' *Motion to File Late Claim.*

G. The State is Not Entitled to Attorneys Fees Pursuant to Idaho Code § 12-121.

The State claims that it is entitled to attorney fees on appeal under Idaho Code § 12-121. *Respondent's Brief* at 36. The State's claim is unsupported by the facts and the law relating to this case.

Finding that the Edens "have presented the court with legitimate questions for the court address," the District Court in this case denied the State's 12-121 claim for attorney fees below:

> The Idaho Supreme Court has held with respect to Idaho Code § 12-121 that "[i]n normal circumstances, attorney fees will only be awarded when this court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation." *Reed v. Reed,* 160 Idaho 774, 780, 379 P.3d 1042, 1048 (2016). In this case, the Movants have presented the court with legitimate questions for the Court to address. The Court does not find the issue of whether the Court Documents should be set aside under the facts and circumstances presented here to be frivolous or without foundation. Therefore, the Court in an exercise of its discretion declines to award attorney fees to the State in this proceeding.

Order Denying Motions at 7-8; R Vol. I, pp. 381-82.

This same rationale should be applied by the Supreme Court to deny the State's claim for attorney fees on appeal. The State is not entitled to an award of fees under Idaho Code § 12-121,

which provides for attorneys fees awards only when a case "was brought, pursued or defended frivolously, unreasonably or without foundation":

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. This section shall not alter, repeal or amend any statute that otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Idaho Code § 12-121 (amended March 1, 2017). Rule 54(e)(2) similarly limits the power of the court to award attorney fees pursuant to Idaho Code § 12-121. Rule 54(e)(2) provides:

> Pursuant to the statutory amendment effective March 1, 2017, attorney fees under Idaho Code Section 12-121 may be awarded by the court only when it finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation, which finding must be in writing and include the basis and reasons for the award. No attorney fees may be awarded pursuant to Idaho Code Section 12-121 on a default judgment.

I.R.C.P. 54(e)(2) (2017).

This Appeal does not present a situation that can be characterized as a case that is brought or pursued "frivolously, unreasonably or without foundation." This Court is not being "simply invited … to re-weigh the evidence presented to the district court" as was the situation in *Doble v. Interstate Amusements, Inc.*, 160 Idaho 307, 372 P.3d 362 (2016), *cert denied*, ___ U.S. ___, 137 S.Ct. 343, 196 L.Ed.2d 263 (2016). The Edens' case presents evidence that existing Idaho law was violated and presents good faith arguments for the application and/or the extension of

Idaho law to vacate the *Order Denying Motions, the Disallowal Order and the Final Unified Decree* with respect to Water Right No. 37-864.

This case also is not frivolous or without foundation because it contains legitimate issues of first impression. A claim is not necessarily frivolous simply because the District Court concluded it fails as a matter of law and the Appellants are presenting arguments that were made before the District Court, as the State asserts. *See Garner v. Povey*, 151 Idaho 462, 468, 259 P.3d 608, 614 (2011) ("[t]he question is whether the position adopted was not only incorrect, but so plainly fallacious that is could be deemed frivolous, unreasonable, or without foundation."); *Elliott v. Verska*, 152 Idaho 280, 291, 271 P.3d 678, 689 (2012) (holding appeal was not frivolous, unreasonable, or without foundation because the issue had not been considered previously by the Court); *Hammer v. City of Sun Valley*, No. 43079-2015, 2016 Westlaw 7384133 at 10 (Idaho Dec. 21, 2016) (denied award of attorney fees under 12-121 because the issue was previously unsettled; it was a case of first impression).

Most persuasive is language of the Court in the case of *Phillips v. Balzier-Henry,* 154 Idaho 724, 731, 302 P.3d 349, 356 (2013), where the Court said: "[w]hen deciding whether attorney fees should be awarded under I.C. § 12-121, the entire course of the litigation must be taken into account; and if there is at least one legitimate issue presented, attorney fees may not be awarded, even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation." 154 Idaho at 731, 302 P.3d at 356. The Edens' appeal raises numerous legitimate issues of first impression.

Thus, the appeal cannot be considered to be frivolous, unreasonable, or without foundation and the State is not entitled to an award of attorney fees under Idaho Code § 12-121.

II. CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that the *Order Denying Motions* should be reversed and the matter remanded with instructions to allow the Edens to file a Late Notice of Claim for Water Right No. 37-864.

DATED THIS 25th day of August, 2017.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Merlyn W. Clark, ISB #1026

By _____
Dana L. Hofstetter, ISB #3867
Attorneys for Appellants Gary and Glenna Eden

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of August, 2017, I caused to be served two (2) true copies of the foregoing APPELLANTS' REPLY BRIEF by the method(s) indicated below, and addressed to each of the following:

Attorney General Lawrence G. Wasden
Deputy Attorney General Darrel G. Early
Deputy Attorney General Shantel M. Chapple
Knowlton
State of Idaho
Natural Resources Division
Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010

☑ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☑ E-mail
☐ Telecopy

Director of IDWR (*Courtesy Copies*)
Statehouse Mail
P.O. BOX 83720
Boise, ID 83720-0098

☑ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy

Dana L. Hofstetter

ADDENDUM

Beaupre v. Kingen, 109 Idaho 610, 710 P.2d 520 (1985), involved an award of punitive damages to the plaintiff, Beaupre. Beaupre cross-appealed, claiming the award of punitive damages was insufficient and argued on appeal that the instructions on punitive damages that were given to the jury were erroneous because they did not comport with new standards that had been established in *Umphrey v. Sprinkel,* 106 Idaho 700, 682 P.2d 1247 (1983) and *Cheney v. Palos Verdes Inv. Corp.,* 104 Idaho 897, 905, 665 P.2d 661, 669 (1983). The Supreme Court refused to consider Beaupre's argument stating, "[a]lthough Umphrey and Cheney both predated the trial of this case, those cases were apparently not called to the attention of the trial court, nor are the new standards established by those cases argued as a basis for evaluating the jury instruction challenged on this appeal. Therefore, we will not consider Beaupre's assertions of error on cross-appeal." *Beaupre,* 109 Idaho at 614, 710 P.2d at 524.

Heckman Ranches, Inc. v. State, 99 Idaho 793, 589 P.2d 540 (1979), involved an action to quiet title to land near Whitebird, Idaho. On appeal, appellants maintained they had established title to the disputed property by adverse possession. However, the district court stated in its memorandum opinion that the appellants had not alleged title on the theory of adverse possession and had objected at trial to testimony concerning adverse possession because they were not claiming title by adverse possession. The Supreme Court rejected the new theory stating: "Issues not raised below will not be considered by this court on appeal, and that parties will be held to the theory upon which the case was presented to the lower court. *Dunn v. Baugh,* 95 Idaho 236, 506 P.2d 463 (1973); *Willows v. City of Lewiston,* 93 Idaho 337, 461 P.2d 120

(1969); *Williams v. Havens,* 92 Idaho 439, 444 P.2d 132 (1968); *Frasier v. Carter,* 92 Idaho 79, 437 P.2d 32 (1968). This issue was not argued below and is therefore not before this court on appeal." *Heckman Ranches, Inc.,* 99 Idaho at 799, 589 P.2d at 546-47.

Dunn v. Baugh, 95 Idaho 236, 506 P.2d 463 (1973), was an action for dissolution of a partnership and an accounting. On appeal, Dunn asserted for the first time that the trial court erred in failing to hold the defendant had breached a fiduciary obligation to Dunn. This issue had never been raised in the trial court. The Supreme Court rejected the issue stating: "Issues not presented to the trial court will not be considered on appeal. *Williams v. Havens,* 92 Idaho 439, 444 P.2d 132 (1968); *Fraiser v. Carter,* 92 Idaho 79, 437 P.2d 32 (1968); *Swaringen v. Swanstrom,* 67 Idaho 245, 175 P.2d 692 (1946)." *Dunn,* 95 Idaho at 237-38; 506 P.2d at 464-65.

Willows v. City of Lewiston, 93 Idaho 337, 461 P.2d 120 (1969), was a case where residents of Lewiston Orchards (an area on the bench above and adjacent to the City of Lewiston) sued to enjoin the City from annexing the Orchards. One of the issues was whether owners of burial lots in an Orchards cemetery were "land owners" who had the right to vote for or against the annexation. The trial court apparently ruled on some additional issues that were not properly presented to the trial court, so the Supreme Court refused to consider these additional issues, stating: "Appellants have assigned as errors the court's decision on each of these additional issues, but since such issues were not properly presented to the trial court, they will not be considered on appeal." *Willows, 93 Idaho at 340-41, 461 P.2d at 123-24.*

Williams v. Haven, 921 Idaho 439, 444 P.2d 132 (1968), was a case where the seller of real estate on an installment contract sued to foreclose and forfeit the buyers' rights in the

contract and property. In their original pleadings, the defendant asserted as part of their answer and counterclaim that Plaintiff had been charging them excessive interest on the installments, but they never pursued the claim in the trial court. On appeal from the trial court decision granting the foreclosure, the defendant asserted that the plaintiff demanded excessive interest and tried to raise the issue of usury. The Supreme Court rejected the claim, stating that it did not consider the original pleading sufficient to raise the issue of usury; that the allegation of "excessive interest," standing alone, does not allege usury. Further, the Court said that it would not consider on appeal issues not originally raised in the trial court, citing *Christensen v. Stuchlik,* 91 Idaho 504, 427 P.2d 278 (1967); *Cantlin v. Carter,* 88 Idaho 179, 397 P.2d 761 (1964); *Miller v. Miller,* 88 Idaho 57, 396 P.2d 476 (1964); and *Robinson v. Spicer,* 86 Idaho 138, 383 P.2d 844 (1963).

Frasier v. Carter, 92 Idaho 79, 437 P.2d 32 (1968), was an action to enforce an agreement by a lawyer to pay a client for damages resulting from the failure of the lawyer to properly probate an estate in lieu of an action for malpractice against the lawyer. The case went to a jury who held for the client and the lawyer appealed. On appeal, the lawyer tried to raise new grounds to support a claim that the judgment was invalid. The Supreme Court rejected the new issues stating, "We have held generally that this court will not review issues not presented in the trial court, and that parties will be held to the theory on which the case was tried. *Christensen v. Stuchlik,* 91 Idaho 504, 427 P.2d 278 (1967), and cases there cited. Here we are not dealing with a question merely of the sufficiency of the evidence to sustain the judgment. In this case defendant did not plead failure of plaintiff to present her claim to the estate. I.R.C.P. Rule 8(c).

The issue was neither presented to, nor tried nor determined by, the trial court." *Frasier,* 92 Idaho at 82; 437 P.2d at 35.

Christensen v. Stuchlik, 91 Idaho 504, 427 P.2d 278 (1967), was an action for personal injuries suffered by plaintiff. The jury returned a verdict for plaintiff. At the close of the plaintiff's evidence, defendant moved for a directed verdict on the ground that the evidence was insufficient to support the verdict, which was denied. Defendant then produced evidence, but did not renew his motion for a directed verdict at the close of all the evidence. Defendant moved for a JNOV which was denied. Defendant appealed asserting that the trial court erred when it denied the JNOV. The Supreme Court ruled that when defendant failed to renew the motion for directed verdict at the close of all the evidence, he foreclosed the trial court from considering a JNOV because under I.R.C.P. 50(b), it was a prerequisite for consideration of a motion for judgment notwithstanding the verdict that a prior motion for directed verdict be made and denied. For that same reason the appellate court held it was precluded from reviewing the sufficiency of the evidence on appeal. *Christensen,* 91 Idaho at 507, 427 P.2d at 281.

Cantlin v. Carter, 88 Idaho 179, 397 P.2d 761 (1964), involved an application to appropriate water in Idaho. The State Reclamation Engineer denied the application when certain protestants objected, asserting that they had prior rights to the water. The applicant appealed the decision to the district court which held that there was no public water available for appropriation. The applicant then appealed to the Supreme Court asserting various theories why the application should be granted. The appellate court held that the evidence supported the finding of the district court that there was no public water subject to appropriation and no error

was made in entering the conclusions of law and judgment based on this finding. The appellate court rejected the other theories stating: "It is fundamental that issues not raised in the trial court will not be considered by this court on appeal and the parties will be held to the theory upon which the cause was tried in the lower court. *Robinson v. Spicer,* 86 Idaho 138, 383 P.2d 844." *Cantlin,* 88 Idaho at 184, 397 P.2d at 764.

Miller v. Miller, 88 Idaho 57, 396 P.2d 476 (1964), was an action to enforce a contract between divorcing spouses. The trial court upheld the contract and the husband appealed, asserting theories that were not raised in the trial court. The Supreme court held that the court would not consider the husband's new theories because they were not presented to the trial court by the pleadings or the evidence, citing *Cox v. Cox,* 84 Idaho 513, 373 P.2d 929 (1962); and *Robinson v. Spicer,* 86 Idaho 138, 383 P.2d 844 (1963).

Cox v. Cox, 84 Idaho 513, 373 P.2d 929 (1962), was an action between adjoining land owners over a road. Respondents sought an injunction to stop appellant from using a road and allowing his cattle to trespass on their property. Appellant counterclaimed alleging the road was a public road. The trial court ruled the road was not public and enjoined the parties from allowing their cattle to trespass. On appeal, appellant asserted twenty-three assignments of error. The appeal court ruled it would not consider assignments of error that were unsupported by citation or argument. The appellate court ruled the evidence supported the judgment of the trial court. *Cox,* 84 Idaho at 517, 373 P.2d at 930.

Robinson v. Spicer, 86 Idaho 138, 383 P.2d 844 (1963), was an action to rescind a contract for the purchase of real estate, alleging that the vendor committed fraud in the sale. At

the close of the buyer's evidence, the buyer informed the court that the buyer was electing to proceed under the theory of rescission instead of a damage theory. The trial court, sitting without a jury, ruled in favor of the seller and denied the buyer's claim for rescission. The appellate court found that the trial court's findings were supported by the evidence. Appellants also asserted that the trial court erred in failing to reopen the trial to admit new evidence on a claim for damages. The appellate court held that where appellants voluntarily elected in the trial court to seek relief under the theory of rescission rather than damages, they waived any claim for damages, stating: "It is the established rule in this jurisdiction that issues not raised in the trial court cannot be presented to this Court on appeal, and the parties will be held to the theory upon which the cause was tried in the lower court. (Citations omitted.)" *Robinson,* 86 Idaho at 145, 383 P.2d at 848.